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No. 208

In the Supreme Court of the United States

OCTOBER TERM, 1960

DOWN TOWN ASSOCIATION OF THE CITY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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No. 298

DOWN TOWN ASSOCIATION OF THE CITY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusion of law of the District Court (R. 103a-105a)[1] are not officially reported. The opinion of the Court of Appeals (Pet. 17-27) is reported at 278 F.2d 313.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1960 (Pet. 28). The petition for certi-

[1] Record citations are to the appendices to the briefs of the parties in the Court of Appeals.

orari was filed on July 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether petitioner is a social club within Section 1710 of the Internal Revenue Code of 1939, which imposes an excise tax upon the dues or membership fees paid by members of such club.

STATUTES AND REGULATIONS INVOLVED

Section 1710(a), Internal Revenue Code of 1939, and Sections 101.24 and 101.25, Treasury Regulations 43 (1941 ed.), are set forth in the Appendix, *infra*, pp. 7-9.

STATEMENT

This refund suit was filed by petitioner to recover excise taxes collected from its members for the period August 1942 to March 1947, and paid to the Collector of Internal Revenue. (R. 2a-4a.) Petitioner, a New York non-profit corporation, owns and maintains a five-story clubhouse for its members in the downtown business district of New York City. On the first floor are a lobby, check-room, smoking room, a cigar counter, a small barber shop, an office and wash rooms. Behind the smoking room there is a small bar where cocktails, oysters and clams are served. In the check room there is a bulletin board on which membership notices, weather information, etc., are posted along with the daily menus. (R. 11a, 103a.)

On the second floor are two large dining rooms and a pantry. Another smoking room (known as the library), located slightly below the second floor, is furnished with upholstered sofas and chairs and has newspapers, magazines and books. Members may use this room for reading and conversation, and may have coffee there after lunch. (R. 11a-12a, 44a-45a.)

On the third floor are three additional dining rooms, a serving kitchen and another pantry. The fourth floor also has a large dining room in addition to six private dining rooms and a pantry. The fifth floor contains the main kitchen, staff dining room, manager's office, linen room, locker room and storeroom, and there is a laundry on a mezzanine above the fifth floor. (R. 12a.)

In order to make the facilities readily available to its members, petitioner employed, as of January 1, 1945, a total of 159 servants including not only cooks and waiters but two barbers, two oyster-men and a bartender. (R. 14a.)

The clubhouse, which is open week-days from 8 a.m. to 4 p.m., is used primarily from 12 noon until 2:30 p.m. House rules permit the clubhouse to be kept open later than 4 p.m. for the accommodation of parties of six or more in the private dining rooms. Liquor sales were about eight per cent of the food sales. The bar is open all of the hours that the clubhouse is open. (R. 13a-14a.)

On September 1, 1942, petitioner had 1,176 members drawn from various professions or businesses, including 548 lawyers, 146 bankers, 98 brokers, 98 manufacturers, 81 in the insurance business, 68 in

the investment business, and 27 in the real-estate business. (R. 15a.)

Members can invite guests, but no guests can attend unless accompanied by a member. On occasion, members have brought members of their immediate families or personal friends, but the great majority of their guests are clients, business associates or prospects of the individual members. Ladies may attend when accompanied by a member, but are restricted to the use of the dining room designated for that purpose. During the tax period in issue, about one-third of all the meals served were served to guests. The entry fees and the dues of some members were paid by their firms as a business expense. (R. 104a.)

Petitioner applied for and obtained exemption from federal income tax as a club "organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes" under 1939 Code Section 101(9). (R. 85a-86a, 104a.)

The District Court found that petitioner's "only reason for being is to afford [its] members a facility for enjoying lunch in convenient and pleasant surroundings and with company attractive to them. We call such a purpose altogether social." (R. 105a.) The Court of Appeals affirmed. (Pet. 17-27.)

ARGUMENT

The conclusion reached by both courts below that petitioner was a "social club" under Section 1710 of the 1939 Internal Revenue Code (Appendix, *infra*, p. 7) during the period from August 1942 to

March 1947, is amply supported by the facts and does not warrant further review. In other cases involving similar facts, the same conclusion was reached. *See Turks Head Club* v. *Broderick*, 166 F.2d 877 (C.A. 1st); *Duquesne Club* v. *Bell*, 127 F.2d 363 (C.A. 3d), certiorari denied, 317 U.S. 638; *Engineers Club of Dallas* v. *United States*, 251 F.2d 52 (C.A. 5th); *Insurance Club of Dallas* v. *United States*, 241 F.2d 830 (C.A. 5th); *Downtown Club of Dallas* v. *United States*, 240 F.2d 159 (C.A. 5th); *Fleming* v. *Reinecke*, 52 F.2d 449 (C.A. 7th), certiorari denied, 284 U.S. 689; *Arkwright Club of City of New York* v. *United States*, 117 F. Supp. 411 (C. Cls.); *Railroad-Machinery Club of New York* v. *United States*, 95 F. Supp. 822 (C. Cls.); *Bankers Club of America* v. *United States*, 87 F. Supp. 253 (C. Cls.); *Uptown Club of Manhattan* v. *United States*, 83 F. Supp. 823 (C. Cls.), certiorari denied, 338 U.S. 823; *Drug and Chemical Club of New York* v. *United States*, 115 C. Cls. 66, certiorari denied, 340 U.S. 810. Also see Sections 101.24 and 101.25, Treasury Regulations 43, Appendix, *infra*, pp. 8-9.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Solicitor General.

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August 1960

APPENDIX

Internal Revenue Code of 1939:

SEC. 1710. TAX.

(a) [as amended by Section 543(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687] *Rate.* There shall be levied, assessed, collected, and paid—

(1) *Dues or Membership Fees.*—A tax equivalent to 20 [1] per centum of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year.

(2) *Initiation Fees.*—A tax equivalent to 20 [1] per centum of any amount paid as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $10 per year.

* * * *

(b) *By Whom Paid.*—The taxes imposed by subdivision (a) shall be paid by the person paying such dues or fees, or holding such life membership.

(26 U.S.C. 1952 ed., Sec. 1710.)

[1] Prior to April 1, 1944, the rate of tax was 11 per centum. See Section 1650 of the Internal Revenue Code of 1939, as added by Section 210 of the Revenue Act of 1940, c. 119, 54 Stat. 516, and as amended by Section 302 of the Revenue Act of 1943, c. 63, 58 Stat. 21.

Treasury Regulations 43 (1941 ed.):

SEC. 101.24. *Determination of Character of Club.*—The purposes and activities of a club or organization *and not its name* determine its character for the purpose of the tax. Every club or organization having social, athletic, or sporting features is presumed to be included within the meaning of the phrase, "any social, athletic, or sporting club or organization," until the contrary has been proved, and the burden of proof is upon it. . Every such club or organization, therefore, unless it falls within the express exemption of the Code (see section 101.30), must collect, return, and pay over the tax imposed by the Code, unless and until it has satisfied the Commissioner of Internal Revenue that it is not in fact "social, athletic, or sporting" within the meaning of the Code and as defined in these regulations. If any such club or organization claims that it is not in fact "social, athletic, or sporting," it shall submit to the collector a copy of its charter or constitution and by-laws, together with a statement showing its actual purposes, activities, practices, and facilities, the character of its expenditures, and such other evidence as may be requested. Upon consideration of the evidence submitted the collector will determine, if he can do so, whether or not such club or organization comes within the provisions of the Code. If, however, the collector is in doubt as to whether or not the club or organization is "social, athletic, or sporting," he will refer the statement and accompanying papers to the Commissioner for decision. * * *

SEC. 101.25. *Social Clubs.*—Any organization which maintains quarters or arranges periodical

dinners or meetings, for the purpose of affording its members an oportunity of congregating for social intercourse, is a "social * * * club or organization" within the meaning of the Code, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but if the social features are a material purpose of the organization it is a "social * * * club or organization" within the meaning of the Code. An organization that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is clearly not a "social * * * club or organization." Most fraternal organizations are in effect social clubs, but if they are operating under the lodge system, or are local fraternal organizations among the students of a college or university, payments to them are expressly exempt (see section 101.30).

* * * *